

1 HONORABLE RICHARD A. JONES
2
3
4
5
6

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MOISES E. PONCE ALVAREZ,

11 Plaintiff,

12 v.

13 KING COUNTY, et al.,

Defendants.

Case No. C16-721-RAJ

ORDER

14 **I. INTRODUCTION**

15 This matter comes before the Court on Plaintiff's Motion for New Trial.

16 Dkt. # 88. Defendants oppose the Motion. Dkt. # 89. For the reasons stated below, the

17 Court **DENIES** Plaintiff's Motion.

18 **II. BACKGROUND**

19 Plaintiff Moises E. Ponce Alvarez filed a complaint against Defendants King
20 County, Deputy Cassandra Bertaina, Deputy Adam R. Buchan, Deputy Jonathan
21 Hennessy, Deputy James Price, and John Does 1-2, alleging claims under 42 U.S.C. §
22 1983 against the officers for excessive force in violation of the Fourth and Fourteenth
23 Amendments, *Monell* claims under 42 U.S.C. § 1983 against King County for
24 maintaining unconstitutional policies and practices, failure to train, and failure to
25 supervise, a Washington state claim for assault and battery, and a Washington state claim
26 for negligent use of force. On June 23, 2017, the Court granted in part and denied in part
27 Defendants' motion for summary judgment. Plaintiff's *Monell* claims, his state law

28 ORDER – 1

1 claims, and his §1983 claims against Bertaina were dismissed. Dkt. # 38. On August 10,
2 2017, at the conclusion of trial, the jury did not find, by a preponderance of the evidence,
3 that Defendants Buchan, Price, and Henessy, violated Plaintiff's right under the Fourth
4 Amendment to be free from excessive use of force. Dkt. # 82. On September 11, 2017,
5 Plaintiff filed this Motion for a New Trial. Dkt. # 88.

6 **III. LEGAL STANDARD**

7 Federal Rule of Civil Procedure 59(a) provides that a "court may, on motion, grant
8 a new trial on all or some of the issues . . . after a jury trial, for any reason for which a
9 new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P.
10 59(a).

11 Because "Rule 59 does not specify the grounds on which a motion for a new trial
12 may be granted," courts are "bound by those grounds that have been historically
13 recognized." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003).
14 Included among these historically recognized grounds are claims "that the verdict is
15 against the weight of the evidence, that the damages are excessive, or that, for other
16 reasons, the trial was not fair to the party moving." *Molski v. M.J. Cable, Inc.*, 481 F.3d
17 724, 729 (9th Cir. 2007) (quoting *Montgomery Ward & Co v. Duncan*, 311 U.S. 243, 251
18 (1940)). Ordinarily, a "trial court may grant a new trial only if the verdict is contrary to
19 the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent
20 a miscarriage of justice." *Id.* (quoting *Passantino v. Johnson & Johnson Consumer*
21 *Prods.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000)).

22 **IV. ANALYSIS**

23 A claim for excessive force requires a showing that the defendant used an
24 objectively unreasonable degree of force. *Graham v. Connor*, 490 U.S. 386, 388 (1989).
25 Assessing whether a law enforcement officer's use of force was reasonable "requires a
26 careful balancing of 'the nature and quality of the intrusion on the individual's Fourth
27 Amendment interests' against the countervailing governmental interests at stake." *Id.* at
28

1 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks
2 omitted)). The following are factors that may be considered when determining the
3 reasonableness of the force used: “the relationship between the need for the use of force
4 and the amount of force used; the extent of the plaintiff’s injury; any effort made by the
5 officer to temper or to limit the amount of force; the severity of the security problem at
6 issue; the threat reasonably perceived by the officer; and whether the plaintiff was
7 actively resisting.” *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416
8 (2015); *Blankenhorn v. City of Orange*, 485 F.3d 463, 477 (9th Cir. 2007); *Graham*, 490
9 U.S. at 396. Plaintiff argues that the jury’s finding that he did not show by a
10 preponderance of the evidence that Defendants used an excessive amount of force is
11 contrary to the weight of evidence presented at trial.

12 On May 21, 2014, Buchan was dispatched to a 911 call in the White Center
13 neighborhood of Seattle. While searching the alley behind the caller’s house, Buchan
14 encountered Plaintiff in his vehicle. The parties dispute what initially occurred in the
15 alley, but eventually Buchan grabbed Plaintiff and pulled him out of the car. Plaintiff
16 began struggling with Buchan. Shortly thereafter, Bertaina arrived and both deputies
17 forced Plaintiff to the ground, using their body weights as leverage. As Plaintiff
18 continued to struggle, Buchan and Bertaina remained on top of him until Price and
19 Henessy arrived. Plaintiff was then handcuffed, but continued to kick and flail at the
20 deputies. The decision was then made to double restrain Plaintiff, or “hog-tie” him. The
21 double restraint was used to secure Plaintiff’s feet to each other, and then bind his feet to
22 his handcuffs. A person that is “hog-tied” cannot stand up, walk, or kick. The parties
23 dispute how long Plaintiff remained hog-tied. Plaintiff contends that he was in the
24 double restraint for 40 minutes. Defendants testified that they did not know how long the
25 double restraint was used, but that Plaintiff continued to writhe on the ground after the
26 double restraint was applied. Dkt. # 88 Exs. 1, 2; Dkt. # 90 Exs. A, B.

27 Plaintiff argues that hog-tying someone for 40 minutes “crosses the line into
28 ORDER – 3

1 unreasonable force.” In support of this argument, Plaintiff cites to the factors in
2 *Kingsley*, arguing that the circumstances surrounding Plaintiff’s arrest were such that
3 Plaintiff did not present a threat to Defendants, therefore allowing Plaintiff to remain
4 restrained for that long constituted an unreasonable degree of force. Dkt. # 88.

5 The relevant Computer Aided Dispatch (“CAD”) report notes that “[w]e have
6 [Plaintiff] double restrained” at 12:43:31, or 12:43 a.m. Dkt. 88 Ex. 4. The notation at
7 1:22:49, or 1:22 a.m., states “[s]ubject was released from double restraints.” *Id.* Plaintiff
8 argues that this evidence establishes that he was in double restraints from 12:43 a.m. until
9 1:22 a.m., or for about 40 minutes. Susan Gordon, the administrator of the CAD system
10 in the King County 911 Communications Center, testified that these entries were made by
11 a dispatcher and that they do not necessarily reflect the actual time that the events
12 occurred. Dkt. # 90 Ex. C. Gordon also testified that CAD entries are not always
13 contemporaneous to the events described for several reasons: 1) a dispatcher may be
14 handling more than one call at a time and may “jump back and forth” between events to
15 make entries, (2) there may be a lag in time because communications are not added to the
16 CAD report until the dispatcher actually updates it, and (3) occasionally a dispatcher is
17 not told about an event at the time it occurs and the event is added later with a time
18 override. *Id.* Entries to a CAD report can also be made by a deputy from the computer in
19 his or her police vehicle. The relevant entries here are not marked as entries made by a
20 deputy or entries made with a time override. Dkt. # 91 at 4.

21 Plaintiff also points to the reported activities of Buchan and the other deputies
22 while he was hog-tied as evidence of the length of time he was restrained. Buchan
23 testified that after Plaintiff was placed in double restraints, the deputies ran Plaintiff’s
24 name and license plate through their computers. Dkt. # 88 Ex. 1. Buchan then went to
25 speak to the person who called 911 and had a discussion with the other deputies about
26 what to do next. *Id.* At some point Buchan wrote the necessary forms for the arrest and
27 gave these forms to Bertaina so she could transport Plaintiff to jail. *Id.* It is unclear from
28

1 the evidence presented at trial at what point after Buchan spoke to the other deputies
2 Plaintiff was released from the double restraints. Additionally, both Buchan and Price
3 testified at trial that they did not remember how long Plaintiff was in double restraints,
4 but that Plaintiff was not double restrained for 40 minutes. Dkt. # 90 Exs. A, B. Plaintiff
5 testified that he did not know how long he was double restrained because he lost
6 consciousness shortly after being handcuffed. Therefore, a determination of the length of
7 time Plaintiff was restrained required consideration of the accuracy of the CAD report
8 notations, consideration of the other evidence presented regarding the events surrounding
9 Plaintiff's arrest, and a determination of the credibility of the witnesses.

10 Even if it was determined that Plaintiff was double restrained for 40 minutes, that
11 determination alone is not sufficient to conclude whether the amount of force used was
12 unreasonable. Plaintiff argues that the amount of time qualifies as an excessive amount
13 of force because the evidence does not prove that Plaintiff continued to resist arrest after
14 Defendants placed him in double restraints. At trial, police practices expert, Christopher
15 Myers, testified that the use of double restraints is appropriate "as long as the person
16 presents an ongoing threat or is resisting and has a need to be restrained," and that the
17 person should be restrained until they are "calm". Dkt. # 88 Ex. 3. It is undisputed that
18 the evidence at trial showed that Plaintiff was initially actively resisting arrest. Dkt. # 88
19 at 8, Dkt. # 89. However it was unclear whether or how long Plaintiff continued to resist
20 after the application of the double restraints. Price testified that after Plaintiff was hog-
21 tied, he "continued to twitch, but [Plaintiff] was no longer able to try and gain leverage."
22 Dkt. # 90 Ex. B.

23 Plaintiff also argues that the length of time he was restrained was not reasonable
24 given the fact that he did not pose a threat to the deputies or bystanders. Buchan testified
25 that after their initial encounter and struggle, Plaintiff continued to struggle after Buchan
26 and Bertaina began to use their body weights to hold him, and after they placed handcuffs
27 on him. Dkt. # 88 Ex. 1. Buchan is six feet and four inches tall, weighed between 250

1 and 260 pounds at the time of the arrest, and is physically bigger than Plaintiff. *Id.*
2 Plaintiff also notes that there were eventually four deputies at the scene and while
3 Plaintiff was hog-tied, he was unable to stand or walk, therefore Plaintiff was no longer a
4 threat while he was restrained and outnumbered. Plaintiff also contends that he suffers
5 from post-traumatic headaches as a result of the length of time that he was restrained, and
6 that if he had been in the double restraints for several minutes as opposed to the alleged
7 40 minutes, this “would have likely eliminated the headache condition that [Plaintiff]
8 continues to suffer from today.” Dkt. # 88.

9 As with the length of time Plaintiff was restrained and how long Plaintiff was
10 resisting arrest, the evidence at trial was unclear regarding the severity of the possible
11 security problem at issue, the threat perceived by the deputies, and whether Plaintiff’s
12 headaches are related to this incident. Determination of these factors required an
13 assessment of the credibility of the witnesses and an assessment of the circumstances
14 surrounding the arrest. The Court may assess the credibility of the witnesses when
15 considering whether to grant a new trial. *Experience Hendrix L.L.C. v.*
16 *Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014). However, the Court must
17 consider whether the jury’s verdict was “against the great weight of the evidence or . . .
18 seriously erroneous,” not “substitute its own inferences and credibility determinations for
19 those of the jury” because the verdict may be contrary to the Court’s own assessment of
20 the evidence. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1230 (9th
21 Cir. 2001). As noted by Defendants, all of these arguments were made by Plaintiff at
22 trial and before the jury. Therefore, in determining that Defendants did not subject
23 Plaintiff to an objectively unreasonable degree of force, the jury considered all of the
24 above evidence and found Defendants’ witnesses and assessment of the events in
25 question more credible than Plaintiff’s.

26 When considering a Rule 59 motion, it is the district court’s duty “to weigh the
27 evidence as [the court] saw it, and to set aside the verdict of the jury, even though
28

1 supported by substantial evidence, where, in [the court's] conscientious opinion, the
2 verdict is contrary to the clear weight of the evidence.” *Molski v. M.J. Cable, Inc.*, 481
3 F.3d 724, 729 (9th Cir. 2007). However, “a stringent standard applies when the motion is
4 based on insufficiency of the evidence. A motion for a new trial may be granted on this
5 ground only if the verdict is against the great weight of the evidence or it is quite clear
6 that the jury has reached a seriously erroneous result.” *Johnson v. Paradise Valley*
7 *Unified Sch. Dist.*, 251 F.3d 1222, 1229 (9th Cir. 2001) (quoting *Venegas v. Wagner*,
8 831 F.2d 1514, 1519 (9th Cir.1987)). Here, the evidence does not definitively support
9 Plaintiff’s assessment of the events in question and a jury could have reasonably found
10 that he did not meet his burden by a preponderance of the evidence. Therefore, Plaintiff
11 has not shown that the jury’s verdict was contrary to the clear weight of the evidence.

V. CONCLUSION

13 For the reasons stated above, the Court **DENIES** Plaintiff's Motion for New Trial.
14 Dkt. # 88.

DATED this 5th day of April, 2018.

Richard D. Jones

The Honorable Richard A. Jones
United States District Judge